LAW

Noncompete agreements should balance opposing interests

Many business owners require employees to sign a noncompetition agreement to protect their legitimate business interests. Employers want such legal protections, while employees want to be able to change jobs and engage in the same business without undue restrictions. If these two competing interests are fairly balanced, the agreement is more likely to be enforceable.

Employers have three primary protectable interests: trade secrets and confidential information; customers and clients; and the workforce of its business. Restrictions on the employee beyond what is necessary to accomplish these ends will jeopardize the enforceability of the agreement. Each of these three interests will be examined in turn.

Stephen Aton

Trade secrets

Every state but New York has enacted some form of trade secret protection for its businesses. Missouri has adopted the Uniform Trade Secrets Act, which defines trade secret as information, whether technical or not, "a formula, pattern, compilation, program, device, method, technique or process," that has economic value because it is not generally known, and is information the owner makes efforts to keep secret.

If another party has threatened to or has actually misappropriated a trade secret, the owner may seek an injunction from the court. Actual and even punitive damages may be recoverable as well. While it is not necessary for an employer to address trade secrets in their noncompetes, it is often included.

Customers

A prime protectable interest of many companies is their customer and client base. Often employees will have direct and frequent contact with customers, and if the company has no agreement with an employee restricting their right to solicit those customers, they could be lured to the new place of business of the former employee. There are two ways that businesses seek to protect their customer base: nonsolicitation clauses and geographic and temporal restrictions.

First, a nonsolicitation clause in the noncompetition agreement prohibits the former employee from soliciting, having contact with or servicing customers and clients with whom the employee had sufficient contact. Some noncompetition agreements purport to restrict the former employee from any contact with company prospects. Provisions restricting contacts with prospects can be stricken if a court feels the restriction is overbroad. Additionally, if the employee had little contact or power to influence company customers, enforcement of the provision is less likely.

The second way to restrict solicitation of clients is to prohibit the employee from doing business in a defined geographic area for a specific period of time after they leave the company's employment. The spatial and temporal restrictions must be reasonable under the circumstances. What is reasonable in one situation may be unreasonable in another. The goal is to balance the needs of the company with the employee's need to participate in a trade or business and earn a living. Some noncompetition agreements are so restrictive that an employee would not be able to earn a living in the same city or even the same state if they left employment. When noncompetition agreements are overbroad and too severe, however, the employee could be required to pay for a legal defense to an alleged violation of the agreement.

» A prime protectable interest of many companies **is their customer and client base.**

Geographic restrictions have the effect of prohibiting a former employee from working with all persons within the defined region, whether they were customers of the business or not. Courts may begin to more closely scrutinize geographic restrictions, since this blanket prohibition swallows the general rule that an employee should be restricted only from soliciting current customers with whom such employee has had meaningful contact.

Workforce stability

Under Missouri law since 2001, a reasonable written covenant not to solicit, recruit or hire employees of the company is enforceable. If the covenant is for no more than one year, it is presumed to be reasonable. A longer duration is possible if reasonable under the circumstances.

While noncompetition agreements may be necessary to protect an employer's legitimate business interests, restrictions that are overbroad may compromise enforceability. The best agreement protects the business interests of a company without unreasonably restricting the economic freedom of the employee. When creating or signing a noncompetition agreement, professional advice is highly beneficial.

Stephen Aton of Aton Law Firm is an estate planning and corporate law attorney. He can be reached at steve@atonlaw.com.